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ABSTRACT

This part of the School Management Handbook provides the elementary school administrator with an overview of civil rights issues affecting school discipline policy. The first section treats the requirements for providing due process and avoiding discrimination against minority groups when following disciplinary procedures. Section 2 covers suspension and expulsion, including the legal differences between these two procedures, and outlines the relevant due process requirements. Section 3 concerns corporal punishment and provides relevant background information, research findings, and guidelines relating to due process and local regulations. The fourth section explores the critical elements of policy on student searches, noting the conditions under which different types of searches have been approved by the courts. The fifth and last section explains the special due process rights that must be accorded handicapped children when imposing disciplinary measures. All five sections include specific recommendations for disciplinary policy. (PGD)

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Number 2 November 1981

SCHOOL MANAGEMENT HANDBOOK

School Discipline: Special Issues

Introduction: Due Process and Discrimination

Suspension and Expulsion

Corporal Punishment

Student Searches

Disciplining Handicapped Students: Implications

Index

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2.1 INTRODUCTION: DUE PROCESS AND DISCRIMINATION

SUMMARY

A disciplinary decision arrived at by improper procedures is subject to being overruled by a court, even if the decision itself is sound.

DUE PROCESS

American law puts a strong emphasis on fair procedures. If the procedures are correct, there is a presumption that the resulting decision is correct also. Conversely, defective procedures can render any decision suspect.

These principles have applied to legal proceedings, both civil and criminal, for centuries. Over the past twenty years, the courts have increasingly imposed them on school disciplinary proceedings as well. In general, a concern with procedure applies to any action by the school that can have long-term adverse consequences to the student. The courts have held such actions to include expulsion and suspension, but not corporal punishment.

The importance of procedure in American law has its roots in the Constitution. For schools, the most important provision is found in the fourteenth amendment: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; . . ." Schools derive their authority ultimately from the state, and so the fourteenth amendment applies to schools. Accordingly, schools cannot deprive students of "property" without due process. The concept of property definitely includes the right to an education. It may also include the right to a clean record, if adverse entries on the record could bar further education or employment.

Where schools' disciplinary actions have been overturned in court, the most common reason by far has been procedures that fail to satisfy the due process requirement.

There are two main elements to due process: notice, and an opportunity to be heard.

NOTICE

The due process requirement of notice obliges the school to notify the student--and sometimes the parents--of certain facts. Precisely when a notice is required, what facts it must contain, and the required form of the notice itself all vary with the circumstances.

Introduction--2.2

A notice prior to an offense typically must specify that the activity in question is indeed an offense, and should name the punishments that the school may impose on offenders. Disagreements often arise as to whether such a notice is too vague to give students fair warning. (For example: a school rule prohibits "weapons," and a student is in trouble for carrying a screwdriver.) In some instances it seems basically unfair to punish a student for an activity that the student may not have known was wrong. See Section 1.1.

Notice requirements following the offense become more elaborate. Depending on the offense, the proposed punishment, and other circumstances, a notice may have to include some or all of the following. We stress that not all of these apply in every case.

- A description of the offense
- The school's evidence of the offense
- The proposed punishment
- Names of any witnesses on whom the school relies
- Time and place of a hearing on the offense, if any
- The student's right to an attorney or other advisor
- The student's right to examine the school's evidence in advance of the hearing
- The student's right to cross-examine the school's witnesses
- The student's right to call his or her own witnesses
- The student's right to have the school compel the attendance of these witnesses, to the extent that they are under the school's control
- The student's right to a written opinion from the hearing
- The student's right to a verbatim record of the hearing
- The student's right to an appeal
- Procedures by which the student can undertake an appeal.

As a rule, the required procedures and notices become more rigorous with more serious offenses, and with more drastic punishments. Statutes may also impose specific procedures. See, for example, section 2.5 on discipline of handicapped students under PL 94-142.

OPPORTUNITY TO BE HEARD

The second element of due process is an opportunity for the student to present his or her case. Here, too, the requirements vary with the situation. For a relatively minor offense leading to a few days' suspension, a "corridor conference" is enough; see section 2.2. When more severe punishments are contemplated, there may have to be a hearing that amounts to a miniature trial, complete with attorneys and cross-examination.

As with the notice requirement, simple fairness dictates that the student have a chance to tell his side of the story, and the opportunity to prove that he is telling the truth. A full-dress hearing is admittedly expensive and inconvenient, but it is rarely necessary

except in extreme cases. It is often enough to call the student and the complaining witness into the office, invite the student to bring in one or two people who can support his version, and hear what everyone has to say. A few minutes of informal give-and-take will usually bring the truth to light. Just as important, such a mini-hearing will help to show the student that the school genuinely cares about the truth, and is not acting against him capriciously.

DISCRIMINATION IN DISCIPLINE

There are frequent complaints in some areas that school authorities discipline some students more harshly than others. The most typical charge is that minority students draw more severe punishments more often than do white/Anglo students.

The issue has not often been litigated. To succeed in court, a minority student would have to prove more than a disproportionate imposition of punishment. He would also have to prove that the school intended to discriminate. *Tasby v. Estes*, 643 F.2d 1103 (5th Cir. 1981). This is a difficult point to establish.

Where discrimination in discipline is but one issue in a broader dispute, however, a court may find it more readily. In *Ross v. Disare*, 500 F. Supp. 928 (S.D.N.Y. 1977), the court responded to complaints of racial discrimination in school discipline by requiring specific disciplinary procedures: a hearing, a record of the hearing, notice of reasons for the disciplinary action to the student and parents, and prior notice of written statements to be introduced at the hearing. The reasoning, again, is that proper procedures will promote the right decisions.

2.2 SUSPENSION AND EXPULSION

SUMMARY

A school may not suspend or expel a student without a minimum of due process. Failure to give the required due process may leave school officials personally liable to the student.

EXCEPTIONS

There are three situations in which a school may *not* suspend or expel a student even by following the due process rules outlined in this section:

1. When the student's offense is also an activity protected by the first amendment--an exercise of religious belief, freedom of speech, or freedom of the press. (See section 1.4.)
2. When the student has been formally identified as handicapped under PL 94-142 or state law. (See section 2.5.)
3. When the state has not given school officials authority to expel for the offense in question. (The New York courts overturned an expulsion for truancy, *King v. Farmer*, 424 N.Y.S.2d 86 (1979), and reinstated a student who cut classes, *Blackman v. Brown*, 419 N.Y.S.2d 796 (1978), because in both instances the principals lacked authority for their actions under New York law.)

BACKGROUND

The U.S. Supreme Court has held that the fourteenth amendment requires school officials to extend due process to students facing suspension or expulsion. The Court's reasoning: students have a "property interest" in a public education that school officials may not take from them arbitrarily.

WHAT DUE PROCESS IS REQUIRED BEFORE SUSPENSION?

The following rules apply to suspensions of ten days or less. Announced by the U.S. Supreme Court in *Goss v. Lopez*, 419 U.S. 565 (1975) they are binding on all American public schools:

1. The student must be told why he or she is being suspended. An oral statement is enough.
2. If the student denies guilt, the school must explain the evidence on which the suspension is based and hear the student's side of the story. Having done so, it may

then proceed with the suspension.

For short suspensions, the Court had in mind no more than a brief conference in the corridor--what it later called "an 'informal give-and-take' between the student and the administrative body dismissing him." *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 (1978). The student need *not* have the right to an attorney, to cross-examine witnesses, or to call witnesses. Nor do minor penalties added to the suspension increase the due process requirements. See *Pegram v. Nelson*, 469 F. Supp. 1134 (M.D.N.C. 1979), in which a student was suspended ten days and barred from extra-curricular activities for the remainder of the school year. Longer suspensions and expulsions require more formal proceedings, however.

STRICTER RULES FOR EXPULSION

When expulsion is at stake, the lower courts have imposed procedures stricter than those above. (The U.S. Supreme Court has not yet ruled on the question.) The lower courts typically require that students facing expulsion (even for part of a semester or a quarter) must be given these rights:

1. To be notified in writing of the charges and of the other rights listed here
2. To representation by an attorney
3. To cross-examine witnesses
4. To present evidence and witnesses.

Some of the states extend these rights by statute. But a federal court sitting in California implied that it would have required the rights anyway, even without the statute. *Gonzales v. McEuen*, 435 F. Supp. 460 (C.D. Cal. 1977).

Adequate notice is an important part of due process. In New York, a state court reinstated an expelled student because he had only one day's notice of the hearing, not enough time to obtain an attorney. *Carey v. Savino*, 397 N.Y.S.2d 311 (1977).

Fair procedures at the hearing itself are important also. A California court cleared a student's record of an expulsion based on classmates' written accusations against him, where the student had no opportunity to confront and cross-examine his accusers. *Aguirre v. San Bernardino City Unified School District*, 170 Cal. Rptr. 206 (1981). Again, a federal court in Arkansas overturned an expulsion because the student was not allowed to question the accusing teacher at the hearing. *Dillon v. Pulaski County Special School District*, 468 F. Supp. 54 (E.D. Ark. 1978). The student's offense was kissing a girl in the hallway and making the defiant remark, "What a drag," when told to stop. (The court, however, found that the kiss was not an expression of opinion protected by the first amendment.)

THE CONSEQUENCES OF OMITTING DUE PROCESS

School personnel and school boards who fail to follow due process rules outlined in this section can be subject to lawsuits from students who are suspended or expelled. And school officials who lose such a suit may have to pay the student from their own pockets.

On the other hand, to have full benefit of due process protections, the student may have to request them at the proper time. In *Ring v. Reorganized School District No. 3*, 609 S.W.2d 1980 (Mo. 1980), all the proposed witnesses for a disciplinary hearing were school employees. The school required its own witnesses to appear, but gave the student's witnesses the choice of appearing or not. The resulting expulsion stood, partly because the student made no protest at the hearing. Moreover, the student was unable to show in court how the absent witnesses might have helped his case.

Ordinarily, a public official performing his or her duties in good faith is immune from suit. But the U.S. Supreme Court created an exception where school officials violate students' constitutional rights, including due process rights. *Wood v. Strickland*, 402 U.S. 308 (1975). Ignorance of the law is no excuse, added the Court.

MUST THE STUDENT BE WARNED?

Students can be warned against certain behaviors either formally by distribution of written student rules, or informally in conversation. Either type of warning is enough, and in fact, the vast majority of suspensions and expulsions come after suitable warnings. But when the student has *not* been warned ahead of time, the courts disagree on whether the school may impose disciplinary measures anyway. Two examples:

- After a student had been warned not to bring marijuana "on the campus," he was found with marijuana in a car parked just off school property. A Texas state court overturned his explusion on the ground that he had not, in fact, brought marijuana on the campus and so had not violated the warning he received. *Galveston Independent School District v. Boothe*, 590 S.W.2d 553 (1979).
- In Wyoming, on the other hand, a specific warning is unnecessary. There, a student was charged with driving to endanger a school bus. Although there was no school regulation against that behavior--and although the student was acquitted of criminal charges arising from the incident--the state supreme court allowed school officials to expel him. *Clements v. Board of Trustees*, 585 P.2d 197 (1978).

A NOTE OF CAUTION

The school board's attorney at a disciplinary hearing should not both prosecute the case against the student and also give the board legal advice in reaching its decision. Courts may find this practice unfair to the student, because it gives the attorney a great deal

of influence over the outcome.

One expelled student was reinstated partly because the same attorney had both prosecuted him and advised the board. *Gonzales v. McEuen*, 435 F. Supp. 460 (C.D. Cal. 1977). Other courts have also warned against the practice. Some courts, however, allow the attorney to serve in the double role. See *Tasby v. Estes*, 643 F.2d 1103 (5th Cir. 1981). School boards can avoid the problem by retaining two attorneys, by having someone else argue the case against the student, or by doing without legal advice during the hearing.

RECOMMENDATIONS

1. Distribute a student handbook that lists all school rules. Be specific where possible, but also word the rules broadly enough to cover unexpected offenses. Make it clear in the handbook that suspension or expulsion can result from violations. Be sure that every student receives a copy. Distribution of such a handbook will constitute fair warning to students, as far as later court challenges are concerned.
2. Use disciplinary suspensions and expulsions *only* when absolutely necessary. Some colleges and employers will not accept a graduate who has been so disciplined, so the long-term consequences to the student may be out of proportion to the offense.
3. For a suspension of ten days or less: Notify the student of the charges. An oral statement is sufficient. If the student protests, you must explain the evidence and listen to the student's side, but you may still suspend the student immediately thereafter. This due process will satisfy the student's constitutional rights. But if local rules in your jurisdiction are more stringent, you must follow those rules instead. It is also advisable to notify the student's parents in writing of the charge, the evidence, and the penalty. If local rules give the parents or the student a right of appeal, this information should also be included in the written notice.
4. Following oral due process for a short suspension, the staff member responsible should place in the files a brief written statement of the offense, the evidence against the student, a summary of the conversation with the student, the date and place the conversation took place, and the names of any witnesses to the conversation.
5. For a suspension of more than ten days but less than several weeks: The courts have not specified the due process required for this form of discipline, except to say that procedures must be more formal than for a short suspension. This would suggest, at the very least, a hearing to which parents are invited. To be certain of overcoming a legal challenge on due process, follow the guidelines in the next paragraph.
6. For expulsion, including limited expulsion for the remainder of the semester or quarter: There must be a formal hearing, usually conducted by the school board. Parents must have adequate written notice of the hearing (at least seven days). The

notice should specify the charges, and only the charges mentioned in the notice can be raised at the hearing. The notice should also specify the student's right to be represented by an attorney, to cross-examine accusing witnesses, and to present witnesses and evidence on his or her own behalf. The school should make every reasonable effort to have school personnel whom the student wishes to question present at the hearing and to secure their cooperation. The decision-making person or body should prepare a written opinion stating the facts of the incident, as determined from the evidence, along with its decision.

7. The same attorney should not both prosecute the case against the student and also give the decision-making body legal advice during the hearing.
8. Make a tape recording of the hearing. Retain the tape along with copies of the notice sent to the parents and the written opinion.

2.3 CORPORAL PUNISHMENT

SUMMARY

Most jurisdictions permit the use of corporal punishment in the schools, although the weight of expert psychological opinion is strongly against it. There are many state and local rules on the use of corporal punishment. Where such rules are in force, they must be followed exactly, or school staff run the risk of legal liability. In the absence of rules, the courts will sanction any punishment that is "reasonable" and "not excessive," but *any* corporal punishment is more likely than not to be counterproductive from an educational standpoint.

EXCEPTIONS

Corporal punishment is banned by statute or court decision in Hawaii, Maine, Massachusetts, and New Jersey. It is also banned by regulation in several counties and local districts, including some of the large cities.

BACKGROUND

From ancient times, the law has given schoolteachers a special privilege to discipline the students in their care. Early court decisions in this country did so by extending the parents' privilege of discipline to the teacher, regarding the teacher as "standing in the parents' shoes." Modern courts, seeking to uphold corporal punishment in the face of parents' objections, have based the privilege instead on the state's interest in maintaining order in the schools.

The U.S. Supreme Court reaffirmed the teacher's privilege of discipline in *Ingraham v. Wright*, 430 U.S. 651 (1977), holding that the eighth amendment freedom from cruel and unusual punishment applies only to criminals and not to schoolchildren.

RESEARCH FINDINGS

Reputable research in recent years has consistently found that corporal punishment is *not* an effective way to bring about positive, long-term changes in student behavior. Moreover, corporal punishment has unintended side effects that can result in *negative* influences on students' attitudes and behavior.

By inhibiting the development of inner mechanisms such as conscience and the search for others' approval, corporal punishment may impede the child's gaining internal control

of his or her own discipline. That is, even when it does bring about temporary changes in behavior, corporal punishment is largely ineffective in promoting the attitude changes that could make the new behavior permanent. Corporal punishment may also have these undesirable outcomes:

- Teaching by example that violence is an acceptable way to solve problems
- Encouraging deviousness to avoid being caught (instead of developing the inner resources not to do wrong)
- Encouraging aggressiveness in the child through role-modeling by an authority figure
- Reducing ability to concentrate on academic tasks
- Promoting anxiety in other children.

Public support of corporal punishment seems to rest in part on the misapprehension that schools use it mostly on older students and only for very serious offenses. Surveys show, however, that the students most likely to be paddled are in elementary school, and that many schools use corporal punishment routinely for minor infractions.

DUE PROCESS REQUIREMENTS

From the legal standpoint, school officials need *not* give students notice or a chance to protest before inflicting corporal punishment, unless local rules say otherwise. *Ingraham* has removed all due process as a constitutional requirement. Many jurisdictions, however, adopted and *still retain* the rules laid out in an earlier decision, *Baker v. Owen*, 395 F. Supp. 294 (M.D.N.C. 1975), *aff'd* 423 U.S. 907. These rules are:

1. Students must know in advance what behaviors might lead to corporal punishment, except for behavior "so anti-social or disruptive in nature as to shock the conscience."
2. There must be a witness to the punishment, who must be informed beforehand and in the student's presence as to the reason for the punishment, and to whom the student can spontaneously protest.
3. On request, parents are entitled to a written explanation and the name of the witness.

Where any such local rules are in effect, failure to follow them can leave school staff open to dismissal and to parents' lawsuits. Where there are no local rules, school officials are not bound to offer the student any warning or explanation. But school people who decide to use corporal punishment, in the face of research evidence to the contrary, should be aware that it is not likely to discourage the unwanted behavior unless the student involved is at least informed of the reason for the punishment.

LIMITATIONS ON CORPORAL PUNISHMENT

Approximately half the states and many local jurisdictions regulate procedures for administering corporal punishment. Typical regulations specify:

1. The implement to be used, most often a paddle of stated dimensions
2. Parts of the body on which punishment may be inflicted, most often the buttocks but occasionally the hands
3. The maximum number of strokes, typically about five, but in some places as high as ten for older students.

The courts consistently allow punishment within local rules or local court guidelines, even when it results in injury to the student. Examples of punishments allowed include:

- Paddling that left severe bruises (Louisiana). *LeBlanc v. Tyler*, 381 So. 2d 908 (1980).
- A student's hand injured by a rubber strap (Louisiana). *LeBoyd v. Jenkins*, 381 So. 2d 1290 (1980).
- Another student's hand injured when she attempted to protect her buttocks from a rattan stick (Missouri). *Streeter v. Hundley*, 580 S.W.2d 283 (1979).
- Two students required to paddle one another in view of the class (Louisiana). *White v. Richardson*, 378 So. 2d 162 (1979).

Conversely, punishment in violation of local rules has been ground for dismissal, even when no injury resulted. Examples include:

- A teacher who slapped students in the face, where board guidelines prohibit doing so (North Carolina). *Kurtz v. Winston-Salem/Forsyth County Board of Education*, 250 S.E.2d 718 (1979).
- A teacher who struck students in the presence of other students, where state rules prohibit it (Hawaii). *Shorba v. Board of Education*, 583 F.2d 313 (1978).

It is important to note that a school official who administers corporal punishment in violation of the local guidelines may be held *personally* liable.

Where state and local guidelines are different, the more restrictive ones govern. For example, in Iberville Parish, Louisiana, it was held permissible for a teacher to kick a student on the buttocks. But in Sabine Parish, also in Louisiana, a school board resolution limits corporal punishment to the use of a paddle. There, a similar kick under similar circumstances made the teacher liable to the student for damages.

Where there are no local guidelines, the punishment need only be something less than "excessive." A survey of the cases shows that even severe bruising and temporary

disability are not always sufficient to establish excessive punishment in the eyes of the court.

RECOMMENDATIONS

Use of force against a student is *not* advised except in those rare circumstances where it is necessary to protect the student or others from injury (as in breaking up a fight, for example).

The weight of expert psychological opinion is strongly against use of repeated corporal punishment in the school. Nevertheless, some schools use corporal punishment as a matter of course, and in some jurisdictions their personnel are open to legal liability. According to recent legal cases and experienced advice, compliance with the following suggestions will minimize the risk of adverse action in court:

1. Be thoroughly familiar with all state and local statutes and regulations that apply in your area. (In a few states, applicable guidelines appear in court decisions rather than regulations.)
2. Notify students in advance of misbehaviors that can result in corporal punishment. Restrict corporal punishment to those behaviors.
3. Do not use corporal punishment as a first line of discipline. When other disciplinary measures have proved ineffective, warn the student at least once that persisting in the proscribed behavior may lead to corporal punishment.
4. Always have an adult witness of the same sex as the student present for the punishment.
5. Inform the student, in the witness's presence, of the offense for which he or she is being punished.
6. Whenever possible, have a person of the same sex as the student administer the punishment.
7. Carry out the punishment in private, with the student fully clothed.
8. Use only an implement specified in local rules. In the absence of rules, use nothing more injurious than a wooden paddle.
9. Strike the student only on the buttocks.
10. Limit the punishment to the number of strokes specified in local rules. In the absence of rules, do not exceed approximately five strokes.
11. After the punishment, notify the parents promptly in writing--unless, in your judgment, doing so may lead to abuse at home.
12. Have the person who administered the discipline notify his or her superior, usually the principal or superintendent, of the reason for the punishment and the circumstances under which it was carried out. Notification should be in writing.

13. When parents object to corporal punishment, request a meeting to explain the school's policies and the statutes and regulations (if any) governing the use of corporal punishment in your locale. Explain also that other certain specified behaviors are subject to corporal punishment and that only disciplinary measures have been attempted without the desired results. If you cannot obtain the parents' approval, however, continue to explore alternative means of discipline. Do not use corporal punishment over parental objection without first ascertaining the school's legal position, through an attorney if necessary.

2.4 STUDENT SEARCHES

SUMMARY

It is ordinarily permissible to search a student's pockets and belongings if school officials have reasonable cause to believe that weapons, drugs, or other contraband will be found.

BACKGROUND

Students are entitled to consitutional protections, subject to "the requirements of appropriate discipline in the operation of the school." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). (See section 1.4.) In particular, students are entitled to the fourth amendment prohibition against unreasonable searches and seizures. The rules on school searches follow generally from the rules for searching criminal suspects.

The U.S. Supreme Court has repeatedly held that a search without a warrant is unreasonable, and is therefore prohibited--but the Court has also allowed many exceptions to the warrant requirement. Because school situations can develop rapidly, the delay to seek a warrant will often be unwise. As a result, most school searches must fit one of those exceptions to be valid.

In a criminal case, government officials can neither obtain a search warrant nor search without a warrant, under most of the exceptions, unless they first have "probable cause" to search. Probable cause requires sound evidence *before* the search that the suspect possesses incriminating items. In school searches, however, most courts partially relax the probable cause requirement.

The Supreme Court's "exclusionary rule" says that evidence discovered during an invalid search cannot be used against a criminal suspect. *Mapp v. Ohio*, 367 U.S. 643 (1961). While the exclusionary rule has come under attack in recent years, all but a few courts still apply it to school searches. The search must be justifiable before it begins, or the evidence it uncovers is useless.

Evidence found in a school search can be used for either of two purposes: for school disciplinary action, such as suspension or explusion, or for criminal prosecution. Most courts do not draw a distinction between the two. A search must ordinarily meet the same standards to suspend a student as to convict him or her of a criminal offense.

Student Searches--2.18

THE "PROBABLE CAUSE" EXCEPTION

Most valid school searches fall in this category. In the majority of jurisdictions, a school official may legally search without full probable cause. Thus, searches that might be unconstitutional if conducted on the street by a police officer become valid within the school building.

The source of this doctrine is *Terry v. Ohio*, 302 U.S. 1 (1968), in which the Supreme Court allowed a police officer to frisk a suspect whom the officer had "reason to believe" was armed and dangerous. The Court spoke of balancing the need to search against the invasion of the individual's privacy.

In the school context, courts typically balance the need for a safe and secure school environment against the invasion to the student. The doctrine of *in loco parentis*--the school standing in the parent's place--underscores the schools' responsibility to secure student safety, and hence serves to lower the probable cause requirement.

Note, however, that a school official may not search a student on a whim or a mere hunch. The official needs "reasonable cause to believe" or a "reasonable suspicion" that the student is carrying contraband. This is, however, a lesser standard than the probable cause required in criminal cases. Some examples of searches *upheld*:

- A student was required to empty his pockets after a fellow student reported having seen him and others exchanging drugs and cash. The search turned up drugs. *M. v. Board of Education*, 429 F. Supp. 288 (S.D. Ill. 1977).
- An informant told police that students of a certain description were carrying amphetamines in certain pockets. The police notified the school principal, who conducted a search on his own initiative. The information was correct. *State v. McKinnon*, 558 P.2d 781 (Wash. 1977).
- The behavior of a student who had previously been caught with knives and razor blades made a teacher suspicious. On this occasion the student "clutched his pocket" to prevent the teacher from reaching inside. The pocket proved to contain a marijuana cigarette. *In the Interest of L.L.*, 280 N.W.2d 343 (Wisc. 1979).

Once a search is properly undertaken for one type of contraband, any other kind of contraband found may also be seized and used in evidence.

Several courts have listed factors that help to determine whether a reasonable suspicion is sufficient to justify a search:

1. The child's age, history, and school record
2. The prevalence and seriousness of the problem to which the search was directed
3. The risks of delaying for a warrant

4. The reliability of the information that led to the search
5. The teacher or school official's prior experience with the student searched.

In the Interest of L.L., cited above.

A minority of courts insist on the stricter standard of probable cause. *In re Dominic W.*, 426 A.2d 432 (1981) involved a Maryland student reported to have been "looking around" a locker from which a watch was later stolen. An assistant principal felt the student's pockets, reached into one, and found the stolen watch. Holding that the principal had insufficient information for probable cause, an appeals court overturned the lower court's finding of delinquency.

THE "PLAIN VIEW" EXCEPTION

A police officer who sees contraband in plain view may seize it and use it as evidence against the suspect. The officer must, however, have a legal right to be at the vantage point from which the contraband was sighted. The same principle applies in the school environment.

In *State in the Interest of T.L.O.*, 428 A.2d 1327 (N.J. 1980), a student caught smoking by a teacher told a vice-principal that she did not smoke at all. The vice-principal opened the student's purse and found a package of cigarettes. On removing the cigarettes he saw marijuana, drug paraphernalia, and a letter from the student asking a friend to sell marijuana in school. The search was upheld on this chain of reasoning: (1) There was a reasonable suspicion of tobacco use, entitling the vice-principal to open the purse. (2) Once the purse was open and the cigarettes were visible, they could properly be removed. (3) With the cigarettes removed, the marijuana was in plain view and could validly be seized. (4) On finding the marijuana, the vice-principal was justified in continuing the search to determine the extent of the violation.

DRUG-DETECTING DOGS

Two recent cases involve the use of trained dogs to sniff out drug-carrying students. The cases reached opposite results under very similar circumstances. Accordingly, this area of the law is very unclear.

In both cases the dogs were used at the request of school authorities, not the police. Students remained in their seats while handlers led the dogs up and down the aisles, allowing them to sniff each student in turn. When a dog "alerted," the student was required to empty pockets or purse.

This procedure is an invalid search under the fourth amendment, according to a Texas federal District Court in *Jones v. Latexo Independent School District*, 499 F. Supp. 223 (E.D. Tex. 1980). That court found no reasonable suspicion or probable cause to believe

that any particular student was carrying drugs. True, the school's history of drug incidents could promote a reasonable belief that the search as a whole would turn up drugs--as indeed it did. But before a student may be searched, there must be reasonable suspicion as to that individual student. Suspicion concerning the student body as a group is not enough.

An identical search procedure was upheld, however, in *Doe v. Renfrew*, 631 F.2d 91 (7th Cir. 1980). Both the federal District Court sitting in Indiana and the Court of Appeals agreed that this use of dogs is not a search at all under the fourth amendment. Hence, the activity does not require reasonable suspicion or probable cause. Moreover, a dog's alerting (according to this court) constitutes reasonable cause to conduct a pocket search. The first part of the *Doe* decision--that use of dogs is not a search and is therefore permissible--has been criticized by legal scholars and by the judge who decided the *Jones* case. Even colleagues of the Seventh Circuit judges who decided *Doe* have expressed their dissatisfaction. See 635 F.2d 582 (7th Cir. 1980).

A different aspect of the *Doe* case attracted considerable press attention. The dogs alerted to four junior high school girls who proved to have no contraband in their pockets or purses. School officials consequently required the four to undress for a nude search. The lower court held the nude search to be unreasonable, under the circumstances. (Doe's own dog was in heat at the time, which no doubt accounts for the search dog's alerting to her.) The appeals court went farther. Finding the nude search to exceed "the 'bounds of reason' by two and a half country miles," it allowed Doe to seek monetary damages from school officials.

At this writing the use of search dogs is legal in only a few states and illegal in part of one. The law elsewhere has not been determined.

SEARCHING WITHOUT REASONABLE SUSPICION

Not all searches require reasonable suspicion. In areas where students have no "reasonable expectation of privacy," it is permissible to search with no basis at all. *Katz v. United States*, 389 U.S. 347 (1967).

This criterion has not arisen often in the school context, so it is hard to fix precisely the boundaries of the "reasonable expectation." There is certainly a very strong expectation of privacy in the nude body, *Doe*, cited above. There is an expectation in one's pockets and purse, requiring reasonable suspicion to search there. The expectation in a student's locker would probably be less, especially if school authorities have previously announced a policy of searching lockers. Coat pockets inside the locker might have higher protection, however. In public areas, the expectation of privacy is very slight. For

example, authorities could search a student's desk if it is shared with other students during the course of the school day, and possibly otherwise as well. The interior of a student's car is not protected, under a special rule, but closed containers within the car are protected.

In principle, no prior justification is needed if the student freely consents to a search. But a number of courts have held that consent, even when obtained, was not freely given. They typically find the relationship between student and school official to be so laden with authority that students would feel they have no real choice in the matter. Thus, even with a student's permission, the search may still require reasonable suspicion.

The rules that govern searches without cause are complicated enough to puzzle trained police officers and constitutional scholars. The safest course is to consult an attorney *before* undertaking such a search, except as noted below.

RECOMMENDATIONS

1. If you have the slightest reason to suspect that a student may be carrying a weapon, don't hesitate to search. At worst, you may not be able to discipline the student, if he or she challenges on the basis of an improper search and wins. Nevertheless, your aim of removing the weapon will have been achieved. Remember, too, that it is possible that failure to search for weapons, once you have reason to believe they are in the building, could lead to a suit for negligence if a student is injured.
2. Announcing in advance that the school will search lockers from time to time without further warning may help to support the legality of such searches.
3. When an informer has identified a student as carrying drugs, it is usually advisable to conduct a pocket search. Again, even if the search does not stand up in court, the contraband will be out of circulation. But consider the informer's reliability and the suspected student's record and reputation.
4. When searching, first ask the student to empty pockets or purse. Touch the student or the student's belongings only if he or she does not fully comply.
5. Do not use force in a search unless the justification is very strong--for example, if a teacher reports having actually seen the contraband in the student's possession. Instead of using force, it may be possible to suspend the student for failing to obey the request. This achieves much the same result, but leaves the school less susceptible to legal challenge.
6. Nude searches are almost always inadvisable. Conduct one *only* when there is certain reason to believe that it will succeed, and then *only* as a last resort. It is advisable to have a witness to the search, but make every effort to minimize embarrassment to the student. A nude search is likely to have adverse psychological

consequences, especially to a young student. Without excellent justification, or if improperly conducted, it can lead to a successful suit against the school for damages.

7. Keep confidential records of all student searches. The records should include the basis for the search (including the name of the informer, if any); the name of the person conducting the search; the time and place of the search; how the search was carried out; and an inventory of any contraband found.
8. Maintain records also on the general prevalence of drugs, weapons, and other contraband in the school.
9. In case of a challenge, the best defense is twofold: (a) the need for student searches generally in order to maintain health, safety, and discipline in the school; and (b) the grounds for reasonable suspicion in searching the particular student. Both parts of the defense will be most effective when supported by records made at the time.

2.5 DISCIPLINING HANDICAPPED CHILDREN: IMPLICATIONS

SUMMARY

PL 94-142 gives handicapped children special due process rights prior to their suspension or expulsion. Some circumstances make their suspension or expulsion effectively impossible.

EXCEPTION

The requirements in this section do not apply in the state of New Mexico, which does not receive funding under PL 94-142.

BACKGROUND

Handicapped children have a variety of rights under the Education for All Handicapped Children Act of 1975, PL 94-142, 20 U.S.C. §§ 1401 *et seq.* Purposes of the Act include:

1. Payment to the states of approximately one-tenth the average excess costs of educating their handicapped children
2. Assurance that the states will provide all handicapped children with a "free appropriate public education"
3. Due process for the parents of handicapped children, prior to any change in the child's educational placement or program.

The courts have construed suspension or expulsion to be a change in educational placement, and hence subject to the Act's due process requirements.

Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against handicapped students, also applies in disciplinary situations. The courts, however, seem to have taken the position that compliance with PL 94-142 meets the requirements of Section 504 as well. In New Mexico, where only Section 504 applies, there has been no litigation on discipline to date, and so the required standards there are not well established.

WHICH STUDENTS ARE AFFECTED?

Only students who have been formally identified as handicapped are subject to the provisions of PL 94-142. Students who have not been so identified may be disciplined as though they were not handicapped, even if they are handicapped in fact. *Mrs. A.J. v. Special School District No. 1*, 475 F. Supp. 418 (1979).

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A child's permanent file will generally show whether he or she has been formally identified as handicapped. Most often such children will also have IEPs (individualized education plans) in their files. In addition, schools must provide an annual count of handicapped children to their districts. A child's inclusion in that count is evidence of formal identification.

WHAT DISCIPLINE IS ALLOWED?

A school may suspend a handicapped child briefly without due process in any of these circumstances:

- The child's behavior poses a physical risk to himself or herself
- The child poses a physical risk to others
- A short cooling-off suspension will make the need for further discipline less likely
- The child requires a change in educational placement because of disruptive behavior and need be suspended only briefly until the new placement is available.

Ordinarily, any such suspensions should not exceed five to ten days. Schools are advised to notify parents *in writing* as to why the suspension is necessary, and of its negligible effect on the child's educational program.

LONGER SUSPENSION AND EXPULSION

Except as noted above, schools may *not* expel a handicapped student without first extending the due process rights listed below. Because expulsion is a "change in placement" under PL 94-142, it must be attended by the same evaluation and due process procedures required for any other change in placement, *Southeast Warren Community School District v. Department of Public Instruction*, 285 N.W.2d 173 (1979).

Expulsion is not permitted at all, however, if the child's offense is related to his or her handicap. Such an offense would instead be taken as evidence that the child was placed in an inappropriate special education program. The burden of proving that the offense is unrelated to the handicap is on the state and local district, *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981).

To expel a handicapped child, the school must do the following:

1. Assemble an "evaluation team" of the sort required for PL 94-142 evaluations generally, including experts in the child's particular handicap. Obtain a report from the team stating that expulsion is the most appropriate course. A decision to expel by the classroom teacher and principal is not enough.
2. Be prepared to prove that the offense bore no relation to the handicap. This may be

especially difficult if the child is categorized as "seriously emotionally disturbed."

3. Obtain parental approval in writing through the due process procedures listed below.

The above procedures satisfy most of the recent court rulings. They must be followed, even in exceptional circumstances. For example, one court enjoined a school from suspending, for her own protection, a student with a history of self-injury, requiring the school instead to provide personnel for her safety, *Sherry v. New York State Education Department*, 479 F. Supp. 1328 (W.D.N.Y. 1979). The procedures required for discipline are in flux, however, and vary somewhat from one jurisdiction to another. For that reason it's important to check local rules.

Subject to the procedures listed here, expulsion can sometimes be a proper disciplinary tool under PL 94-142. To meet the condition of a "free appropriate public education," however, the school may be obliged to provide some educational services even after expulsion, *S-1 v. Turlington*, cited above.

Note that these steps may result in a long delay before expulsion is possible, especially if the child's parents object. An indefinite or very long suspension is likely to be construed as equivalent to expulsion under these rules.

DUE PROCESS REQUIREMENTS

Before expelling or suspending (except briefly) a handicapped student, the school must:

- Notify the parents in writing, in the parents' native tongue, in language that the parents can understand
- Conduct a meeting of the parents, teacher(s), therapists, evaluators, and anyone else closely involved with the child's placement or education
- Attempt to secure parental approval of the proposed disciplinary action
- Notify parents of their further due process rights.

If the parents fail to approve, they are entitled to a formal due process hearing before a neutral officer, at school expense. The parents may then appeal to the local or state education agency and the state or federal courts. They are also entitled to appeal any court rulings that result. *Until the parents have either approved or exhausted their appeals, the school may not suspend or expel the student.*

RECOMMENDATIONS

1. Use brief suspensions promptly, with notice to the parents, when the child poses a physical threat to himself or herself or to others.
2. Consider a change in the child's placement (usually to a more restrictive environment) instead of disciplinary action. Such changes require the same due process procedures, but are more likely to gain parental approval.

3. When disciplinary action is unavoidable, meet with the parents *before* taking any formal steps, and thus before bringing the due process requirements into play. Informal approval by the parents does not suffice, but may improve the chances of approval at the required due process meeting later on.
4. If there is no practical alternative to expulsion or long-term suspension, consult an experienced attorney *before* taking formal action to determine the precise rules, if any, that the courts and administrative agencies have established in your jurisdiction.

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